

HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS



**REPORT TO THE
2007 NORTH CAROLINA HOUSE OF
REPRESENTATIVES**

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TABLE OF CONTENTS

LETTER OF TRANSMITTAL.....	4
AUTHORIZING LEGISLATION.....	5
COMMITTEE MEMBERSHIP.....	8
COMMITTEE PROCEEDINGS.....	10
COMMITTEE RECOMMENDATIONS.....	14

STATE OF NORTH CAROLINA
HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS



December ____ 2006

TO THE MEMBERS OF THE 2007 North Carolina House of Representatives:

Attached for your consideration is the report of the House Study Committee on State Guardianship Laws established by the Speakers of the House of Representatives pursuant to G.S. 120-19.6(a1).

Respectfully submitted,

Representative Alice Bordsen

Co-Chair

Representative Jean Farmer-
Butterfield

Co-Chair

**James B. Black
Speaker**



**Office of the Speaker
North Carolina House of Representatives
Raleigh, North Carolina 27601-1096**

HOUSE STUDY COMMITTEE ON STATE GUARDIANSHIP LAWS

**TO THE HONORABLE MEMBERS OF THE
NORTH CAROLINA HOUSE OF REPRESENTATIVES**

**Creation of the
House Study Committee on the State Guardianship Laws**

Section 1. The **House Study Committee on the State Guardianship Laws** (hereinafter "Committee") is established by the Speaker of the House of Representatives pursuant to G.S. 120-19.6(a1).

Section 2. The Committee consists of the 16 members listed below, appointed by and the Speaker of the House of Representatives. Members serve at the pleasure of the Speaker of the House. The Speaker of the House may dissolve the Committee at any time.

Representative Alice Bordsen , Co-Chair
Representative Jean Farmer-Butterfield, Co-Chair
Representative Debbie A. Clary
Representative Mark W. Hollo
Representative Melanie Wade Goodwin
Representative Mary E. McAllister
Representative Karen B. Ray
Representative Jennifer Weiss
Public Members
Peter Powell -- Administrative Office of the Courts
Lynne Berry -- Division of Aging and Adult Services, DHHS
Larry K. Johnson -- Director, Rockingham County Department of Social Services
The Honorable June Ray -- Clerk of Court, Haywood County
Darlyne Menscer, M.D. -- Physician with a specialty in Geriatrics, Mecklenburg County
A. Frank Johns -- Attorney with experience in guardianship, Guilford County
The Honorable Ruth Cook -- Member of the Governor's Advocacy Council for Persons with Disabilities, Wake County
John Hardy -- Area Director, Catawba County Counseling and Substance Abuse Services

Public Member designations

- The Director of the Administrative Office of the Courts, or the Director's designee.
- The Director of the Division of Aging in the Department of Health and Human Services, or the Director's designee.
- A county director of social services.
- A clerk of superior court.
- A physician who specializes in geriatrics.
- An attorney who has experience in guardianship matters.
- A representative of the Governor's Advocacy Council for Persons with Disabilities.
- An area authority or county program director for mental health, developmental disabilities, and substance abuse services.

Section 3. The Committee shall study the following:

- (1) Whether guardianship should be a remedy of last resort used only if less restrictive alternatives are insufficient.
- (2) The definition of incompetency.
- (3) Whether courts should be required to make express findings regarding the extent of a person's incapacity and limit the scope of the guardianship accordingly.
- (4) Legal rights retained or lost as a result of being adjudicated incompetent.
- (5) The proper role of attorneys and guardians ad litem in guardianship proceedings.
- (6) The role of public human services agencies in providing guardianship services.
- (7) Legal procedures and protections in guardianship proceedings.
- (8) Public monitoring of guardianship.
- (9) Funding for guardianship services provided by public and nonprofit agencies.
- (10) Educating citizens with respect to guardianship and alternatives to guardianship.
- (11) Prudent investor rules.
- (12) Powers, duties, and liabilities of guardians.
- (13) Review of the State's adult protective services law.
- (14) Enactment of the Uniform Guardianship and Protective Proceedings Act (UGPPA).
- (15) Whether guardianship statutes need revision to provide greater protection of the health and welfare of incapacitated adults.
- (16) Whether the State should track the number of people under private guardianship and, if so, proposed methods for the tracking.

Section 4. The Committee shall meet upon the call of its Co-chairs. A quorum of the Committee shall be a majority of its members.

Section 5. The Committee, while in discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and Article 5A of Chapter 120 of the General Statutes. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

Section 6. Members of the Committee shall receive per diem, subsistence, and travel allowance as provided in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

Section 7. The expenses of the Committee including per diem, subsistence, travel allowances for Committee members, and contracts for professional or consultant services shall be paid upon the written approval of the Speaker of the House of Representatives pursuant to G.S. 120-32.02(c) and G.S. 120-35 from funds available to the House of Representatives for its operations. Individual expenses of \$5,000 or less, including per diem, travel, and subsistence expenses of members of the Committee, and clerical expenses shall be paid upon the authorization of a co-chair of the Committee. Individual expenses in excess of \$5,000 shall be paid upon the written approval of the Speaker of the House of Representatives.

Section 8. The Legislative Services Officer shall assign professional and clerical staff to assist the Committee in its work. The House of Representatives' Director of Legislative Assistants shall assign clerical support staff to the Committee.

Section 9. The Committee may meet at various locations around the State in order to promote greater public participation in its deliberations. The Legislative Services Commission shall grant adequate meeting space to the Committee in the State Legislative Building or the Legislative Office Building.

Section 10. The Committee may submit an interim report on the results of its study, including any proposed legislation, to the members of the House of Representatives, on or before May 1, 2006, by filing a copy of the report with the Speaker's office and the Legislative Library. The Committee shall submit a final report on the results of its study, including any proposed legislation, to the members of the House of Representatives, on or before December 31, 2006, by filing a copy of the report with the Speaker's office and the Legislative Library. The Committee shall terminate on December 31, 2006, or upon the filing of its final report, whichever occurs first.

Effective this 17th day of February, 2006.



James B. Black
Speaker

2/17/06

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SUMMARY OF COMMITTEE PROCEEDINGS

House Study Committee on State Guardianship Laws

August 22, 2006 - 10:00 am - Room 1228

Rep. Farmer-Butterfield, presiding

At the August 22, 2006 meeting, the Committee reviewed the charge made to the Committee in the authorizing legislation. Future meeting dates and potential speakers were discussed and a timeline of completion of the Committee's work and final report were identified. In addition, Committee members presented their concerns about the current guardianship laws including the confusion surrounding the laws, the rise in demand for guardianships and better training and information for all of those involved.

House Study Committee on State Guardianship Laws

September 7, 2006 - 10:00 am - Room 1228

Rep. Bordsen, presiding

At the September 7, 2006 meeting, the Committee heard from Tim Hovis, Committee staff, on the 1994 Omnibus bill and report from the 1994 Legislative Research Commission on Adult Guardianship. Pamela Weaver Best, Deputy Legal Counsel for the Administrative Office of the Courts, made a presentation on the responsibilities of guardians in the State and the basics of guardianship law. Dennis Streets, Director, Division of Aging and Adult Services, gave an overview of public guardianship in the State. Rosalyn Pettyford, Adult Protective Services and Guardianship Program Coordinator spoke to the issue of training and bonding for guardians.

House Study Committee on State Guardianship Laws

September 21, 2006 - 10:00 am - Room 1228

Rep. Farmer-Butterfield, presiding

At the September 21, 2006 meeting, John Saxon, Professor of Public Law and Government at the University of North Carolina at Chapel Hill, presented a brief historical overview of guardianship law in the State. Professor Saxon noted that the first substantive reform of North Carolina's guardianship statutes was in 1977 and included constitutional due process protections. Professor Saxon also presented on the current issues in guardianship that he thought needed to be addressed such as interstate conflicts and guardianship portability; definitions of incompetence and incapacity; legal rights of the wards; the roles of attorneys appointed as guardians ad litem; education and training for guardians; the role of nonprofit agencies as guardians; the powers, duties, and liabilities of guardians; and alternatives to guardianships such as health care powers of attorney and advance medical directives.

House Study Committee on State Guardianship Laws
October 5, 2006 - 10:00 am - Room 1228
Rep. Bordsen, presiding

At the October 5, 2006 meeting, A. Frank Johns, a member of the Committee, made a presentation on revising the statutory provisions of several areas of guardianship law. Mr. Johns stated that the adjudication process needed to be revised including clarification of the roles of guardians ad litem. In addition, Mr. Johns outlined revisions in the appointments of guardians, administration, and accountability. Jim Carr, President of the North Carolina Guardianship Association, offered background information on his organization and noted that all guardians needed to be trained as well as others that are part of the guardianship process such as clerks of court and that training and certification must be important components of any changes. Mr. Carr stated that paying guardians of the person may help alleviate the problems as well as having advance directives in place. Both Mr. Carr and Mr. Johns spoke to eliminating the bonding requirement for guardians of the person. Terry Hammond, Executive Director of the National Guardianship Association presented on the national perspective on guardianship reform and that the State should consider adopting standards of practice for guardianship and treat it as a profession. David Richard, Executive Director of The Arc of North Carolina, made a presentation on the organization and that guardianship is always used as a last resort and that the goal is to restore the rights of the person. Becky Wood, Regional Guardianship Specialist for The Arc, explained how the organization received guardianship referrals and that they emphasized restoring rights and limited guardianships. Barbara Cooper-Robinson, Fiscal/Contract Coordinator for The Arc, gave an over of the organization's fiscal and contract operations. The Arc representatives stated that adequate funding for guardianships, restoration of rights, funding for alternatives to guardianship, increased training and certification, and increased monitoring and oversight were all important goals in the reform process.

House Study Committee on State Guardianship Laws
October 19, 2006 - 10:00 am - Room 1228
Rep. Farmer-Butterfield, presiding

At the October 19, 2006 meeting, Natalie Towns, staff fiscal analyst, made a presentation on the current funding status and sources for public guardianships and information on the funding for required bonds. In addition, Ms. Towns provided information on funding comparisons with several other states. Ms. Charm Nichol, Staff Attorney with the Governor's Advocacy Council for Persons with Disabilities (GACPD), explained the role of the GACPD as an organization that investigates cases of death, abuse, neglect, and exploitation of persons with disabilities. She stated that training for clerks of court and guardians ad litem was very important because of the ramifications of being declared incompetent. In addition, Ms. Nichol advocated limited guardianships whenever possible. Mary Bethel, Associate State Director for the American Association of Retired Persons (AARP), presented that the AARP advocates using guardianship as a remedy of last resort and that competency should be based on functional ability and not on diagnosis. Ms. Bethel also commented that there could be a potential conflict interest when public agencies and corporations serve as guardians and also provide other services to the same individuals. Dr. Michelle Haber, geriatric consultant, presented information to the Committee on the need for multi-disciplinary evaluations and to emphasize what a person can do for himself or herself rather than just focusing on what cannot be done by individuals. Ms. Sandy Pagett, Director of Group Living Services for the Mental Health Association, presented

the challenges associated with identifying guardians and petitioning for guardians. She advocated that more information needs to be provided to the public on these issues as well as restoring an individual's rights when he or she is again capable of making decisions. Ms. Pagett recommended more education on guardianship and the role of guardians as well as mandatory training and monitoring of guardians.

House Study Committee on State Guardianship Laws

November 2, 2006 - 11:30 am - Room 1228

Rep. Bordsen, presiding

At the November 2, 2006 meeting, Dennis Streets and Rosalyn Pettyford made the following recommendations to the Committee on behalf of the Division of Aging and Adult Services at the Department of Health and Human Services:

- Change the definition of "incompetent adult" to reflect the individual's functional capacity.
- Require courts to make express findings regarding the extent of a person's incapacity and conduct exhaustive searches on the availability of families, individuals, or corporate entities to serve as guardians prior to appointing a public agency.
- Define the proper role of attorneys and guardians ad litem in guardianship proceedings and provide training.
- Study the role of public human services agencies in providing guardianship services.
- Monitor and provide oversight of all guardianships in North Carolina.
- Establish funding for guardianship services provided by public and nonprofit agencies under the current guardianship system.
- Expand the statutory provisions on the powers, duties, and liabilities of guardians of the person.
- Develop and implement a comprehensive tracking system to capture the number of people under private guardianships in the State, demographic information, disposition of petitions, and types of guardianships.
- Expand resources to reimburse multidisciplinary evaluations.
- Study the feasibility of adopting standards of practice for guardians in North Carolina.
- Educate citizens with respect to guardianship and alternatives to guardianship.
- Review the State's adult protective services law.

Please see Attachment 1 for detailed information on the recommendations.

Pamela Weaver Best made the following recommendations on behalf of the Clerks of Court and the Administrative Offices of the Courts:

- Establish an Office of Public Guardian or provide the Department of Health and Human Services with sufficient funding to provide the service.
- Provide the local management entities with sufficient funding to complete multidisciplinary evaluations.
- Allow clerks of court the authority to order law enforcement to transport alleged incompetents to multidisciplinary evaluations.
- Allow clerks of court to have authority to decide if a driver's license can be maintained on adjudication of incompetency.
- Raise the amount of personal property that can be sold without a court order.

- Provide funding to Indigent Defense Services for formal, regular training of Guardians Ad Litem.

Please see Attachment 2 for detailed information on the recommendations.

House Study Committee on State Guardianship Laws

November 16, 2006 - 10:00 am - Room 1228

Rep. Farmer-Butterfield, presiding

At the November 16, 2006 meeting, Committee Counsel Tim Hovis presented a draft study bill establishing a Joint Study Committee in the 2007 General Assembly to further study various guardianship issues. John Saxon, Professor of Public Law and Government at the University of North Carolina at Chapel Hill, presented recommendations on statutory revisions to the following areas of guardianship:

- Powers and Duties of the Person
- Public Guardianship
- Jurisdiction and Portability
- Incapacity and Limited Guardianship
- Roles of Court-Appointed Lawyers

Please see Attachment 3 for detailed information on the recommendations.

In addition, Professor Saxon presented a draft rewrite of the State's guardianship laws based on the Uniform Guardianship and Protective Proceedings Act.

Please see Attachment 4 for detailed information on this recommendation.

Dennis Streets presented the top five priorities of the Division of Aging and Adult Services of the Department of Health and Human Services. They are as follows:

- Change the definition of "incompetent adult" to reflect the individual's functional capacity.
- Expand the statutory provisions on the powers, duties, and liabilities of guardians of the person.
- Study the feasibility of adopting standards of practice for guardians in North Carolina.
- Study the role of public human services agencies in providing guardianship services.
- Establish funding for guardianship services provided by public and nonprofit agencies under the current guardianship system.

Please see Attachment 5 for detailed information on this recommendation.

Pamela Weaver Best presented the top three recommendation of the Clerks of Court and the Administrative Offices of the Courts:

- Allow clerks of court the authority to order law enforcement to transport alleged incompetents to multidisciplinary evaluations.
- Allow clerks of court to have authority to decide if a drivers' license can be maintained on adjudication of incompetency. This would change standards from function to functionality.
- Raise the amount of personal property that can be sold without a court order to as high as \$10,000 from the current limit of \$1500.

Committee Findings and Recommendations

Finding 1. The Committee finds that the definition of "incompetent adult" under current law is outdated and insufficient, as it is based upon the diagnoses of certain conditions. For example, if someone is diagnosed with cerebral palsy, the statutory definition would indicate that the person is an incompetent adult and, therefore, may lose his or her rights and freedoms. The definition does not recognize that those individuals may have functional abilities and be fully capable of retaining some independence.

Recommendation 1. The Committee recommends that the terminology used in the statutes should be changed from "incompetent adult" to "incapacitated person" and the definition should be amended to base the determination of incompetence or incapacity on the person's functional abilities. This would allow guardianships to be tailored to the individual's needs and facilitate the use of limited guardianships where appropriate.

Finding 2. The Committee finds that the powers and duties of guardians of the person should be expanded. The current law sets out powers and duties of guardians of the estate in detail. However, as it relates to guardians of the person, the law is vague and gives very little guidance to guardians, who may be untrained and unfamiliar with the responsibilities of a guardian.

Recommendation 2. The Committee recommends that the statutes be amended to add more detailed provisions setting out the powers, duties, and liabilities of guardians of the person.

Finding 3. The Committee finds that funding for guardianship services provided by public agencies under the current public guardianship system is inadequate. There is currently no specifically dedicated funding for these services. In many cases, multidisciplinary evaluations (MDEs) cannot be conducted because funding is not available.

Recommendation 3. The Committee recommends that the General Assembly appropriate funds to cover guardianship services provided by county departments of social services, Local Management Entities (LMEs), local health departments, and county departments on aging, and to cover essential legal and medical consultation.

Finding 4. The Committee finds that there is some confusion regarding the proper role of attorneys and guardians ad litem in guardianship proceedings. While the guardian ad litem is appointed to represent the respondent and make recommendations to the court, there may be times when the respondent's expressed wishes and what the guardian ad litem considers to be in the respondent's best interest do not coincide.

Recommendation 4. The Committee recommends that independent counsel be provided to represent the respondent when there is a conflict between what the respondent wants and what the guardian ad litem feels is in the respondent's best interest.

Finding 5. The Committee finds there is no process for requiring an allegedly incompetent person to attend a multidisciplinary review (MDE), and such a process is needed.

Recommendation 5. The Committee recommends that clerks of superior court be granted the authority to order law enforcement officers to transport alleged incompetents to necessary locations where the multi-disciplinary evaluation (MDE) will be performed if the alleged incompetent refuses to attend on their own.

Finding 6. The Committee finds that the amount of a ward's personal property guardians are allowed to sell is outdated and insufficient. Currently, guardians have the authority to sell up to only \$1,500.00 worth of personal property without a court order to meet the monetary needs of the ward.

Recommendation 6. The Committee recommends that the total amount of personal property that can be sold without a court order be increased to \$15,000.00.

Finding 7. The Committee finds it may be unnecessary for the Division of Motor Vehicles to automatically revoke the drivers' license of an individual who has been declared incompetent.

Recommendation 7. The Committee recommends that the Division of Motor Vehicles be authorized to not automatically revoke a driver's license of an incompetent, if the clerk of superior court recommends the incompetent be allowed to retain the driver's license.

Finding 8. The Committee finds that on the topics of training and education, more is needed. The Administrative Office of the Courts highlighted that a guardian *ad litem* must be appointed for each alleged incompetent, and that guardian *ad litem* is to be a licensed attorney. The Department of Health and Human Services explained that each guardian *ad litem* is to visit with the alleged incompetent as soon as possible after appointment and represent the alleged incompetent's expressed wishes during the court proceedings. Both agencies, however, noted there is no required formal training of the guardian *ad litem*, to reinforce the duties and responsibilities of the appointment. Additionally, the Department of Health and Human Services also expressed concern of the lack of education of the public with respect to guardianship issues, such as disabled children becoming adults and those children's caretakers no longer being legally able to make their decisions, and adults who have not been declared incompetent but are not able to make their own decisions. The Committee also discussed that there are alternatives to guardianship, such as powers of attorney which can be planned for in advance, of which the general public may or may not be aware.

Recommendation 8. The Committee recommends that training be provided to all individuals involved in guardianship, including the guardians *ad litem* of alleged incompetents.

Finding 9. The Committee finds more study on the topic of guardianship is necessary. As noted in the Committee proceedings and the recommendations in this report, the Committee heard a variety of presentations on changes to the guardianship statutes. The Administrative Office of the Courts and the Department of Health and Human Services, Division of Aging and Adult Services gave informational presentations on the responsibilities of guardians and also made subsequent presentations to the Committee on their respective recommendations for change to the current guardianship laws. Professor John Saxon of the University of North Carolina at Chapel Hill's School of Government gave an historical overview of guardianship law and at a later meeting of the Committee made an extensive presentation on possible changes to the guardianship laws including the powers and duties of guardians, public guardianship changes, guardianship jurisdiction and portability, limited guardianship, and the role of court-appointed lawyers in guardianship. Professor Saxon also presented for the Committee's consideration a rewrite of the current Chapter 35A of the General Statutes governing guardianship in the form of a new Chapter 35B based upon the Uniform Guardianship and Protective Proceedings Act.

Committee member Mr. A. Frank Johns, spoke to the Committee on needed changes in the adjudication process including clarification of the role of guardians ad litem, and changes in the appointment of guardians, guardianship administration, and accountability. Additional presentations were made to the Committee by Mr. Jim Carr, President of the North Carolina Guardianship Association and Mr. Terry Hammond, Executive Director of the National Guardianship Association with each presenter stressing the need for increased training and certification of guardians and the adoption of standards of practice.

Several presenters spoke on behalf of The Arc of North Carolina including Executive Director David Richard. Arc representatives gave several goals to be considered by the Committee including the need for adequate funding of guardianship services, alternatives to guardianship, training and certification of guardians, and increased monitoring and oversight of guardians.

Other presentations were made by the Governor's Advocacy Council for Persons with Disabilities, the American Association of Retired Persons, and Group Living Services for the Mental Health Association.

The Committee finds that the General Assembly should continue its study of Guardianship reform. However, given the variety of issues and the extensive changes to the guardianship laws needed to address these issues, the Committee finds that a joint legislative study committee comprised of members and appointees of both the House of Representatives and the Senate is necessary and makes the following recommendation.

Recommendation 9. The Committee recommends the creation of a joint legislative study commission on State guardianship laws comprised of both members and appointees of the House of Representatives and the Senate. (See attached legislation, attachment 6)

**NC House Study Committee on State Guardianship Laws
Recommendations from DHHS Agencies and Local Human Services
Agencies**

November 2, 2006

The following recommendations represent feedback from directors and assistant directors of local agencies who are appointed to serve as disinterested public agent guardians; and DHHS agencies that provide administrative oversight and supervision of the local agencies and North Carolina's public agent guardianship program. A number of these recommendations have a fiscal impact and will require additional study.

1. Change the definition of "incompetent adult" to reflect the individual's functional capacity, such as, the definition in the Uniform Guardianship Protective Proceedings Act (UGPPA) of an "incapacitated person".

- The determination of whether an individual is an incompetent adult should be based on that individual's functional ability, recognizing that he/she may have the capacity to do some activities while needing help with others.
- The current definition in G. S. 35A of "incompetent adult" is based upon a diagnosis, for example, mental illness, mental retardation, cerebral palsy, senility, inebriety, and does not acknowledge the functional abilities of individuals with these diagnoses.
- A focus on the individual's functioning will allow guardianships to be tailored to the particular individual and facilitate the use of limited guardianships.

(Recommended by: Division of Aging and Adult Services, NC
Association of County Directors of Social Services, Division of Public
Health)

2. Require the courts to make express findings regarding the extent of a person's incapacity and limit the scope of the guardianship accordingly. Clerks of Court should conduct an exhaustive search of the availability of families, individuals or corporate entities to serve as guardian prior to appointing a public agency.

- Courts are authorized to order multidisciplinary evaluations and other assessments to determine the extent of the respondent's functional capacity.
- Courts may order limited guardianships, whenever appropriate, to allow individuals to control as much of their own decision making as appropriate.
- Currently courts are not required to order limited guardianships.
(The UGPPA requires clerks to consider limited guardianships first,

and if a full guardianship is ordered, clerks must give an explanation.)

- Funding is needed for public agent guardians to pay for medical and legal consultations on behalf of wards (or potential wards) so that the appropriate decisions can be made for their care and protection.

(Recommended by: NC Association of County Directors of Social Services)

3. Define the proper role of attorneys and guardians ad litem in guardianship proceedings and provide training.

- Guardians ad litem (GAL) are required to visit with the respondent as soon as possible after being appointed; represent the respondent's expressed wishes during the guardianship proceeding; and recommend limited guardianships, as appropriate.
- Currently the statute does not require training for guardians ad litem on how to carry out this role and responsibility.
- There is also concern that the GAL appointed by the court to represent the respondent in guardianship proceedings represents the court rather than the respondent.
- The respondent should have counsel independent of the court to ensure due process rights are represented.

(Recommended by: Division of Aging and Adult Services, Division of Public Health, NC Association of County Directors of Social Services)

4. Study the role of public human services agencies in providing guardianship services.

- The role of public human service agencies in providing guardianship services should be studied.

(Recommended by: Division of Aging and Adult Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

- The current House Study Committee on State Guardianship Laws should be continued and expanded to include Senate members for SFY 07-08 and 08-09 of the legislative biennium.
 - The first items for consideration by the Study Committee should be a comprehensive study of the existing public agency guardianship program, including recommendations for improving the system and providing full funding.

(Recommended by: NC Association of County Directors of Social Services)

- There should be an impartial, third party, neutral public entity to serve as the guardian of last resort. As the mental health world has changed and Local Management Entities (LMEs) no longer have the kind of staff to supervise the issues presented by wards, and because of the conflict issues of being a primary purchaser of

services with providers, it is felt that a neutral third party would serve the interests of wards best.

(Recommended by: NC Council of Community Programs)

- An Office of Public Guardianship should be established to case manage the wards (indigent) and could do so on a regional basis.

(Recommended by: Division of Public Health)

- Public agencies (DSS, Aging, Health, and Mental Health LMEs) should not function in the guardianship role. (Recommended by: NC Association of Local Health Directors, Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)
- Consider contracting out guardianship to a corporation or a public entity that employs both a lawyer and a licensed care manager who work solely with guardianship.

(Recommended by: Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)

5. Monitor and provide oversight of all guardianships in North Carolina.

- The guardianship statute provides mechanisms for monitoring public guardianships through Status Reports, inventories and annual accountings.
- Clerks of Court provide detailed oversight and monitoring of guardianships of the estate through mandatory inventories and annual accountings to the court.
- The guardianship statute only requires corporations and disinterested public agents to file Status Reports. There is no requirement for family member guardians of the person to file Status Reports.
- The receipt of Status Reports varies from county to county, and as a result there is very little third party review of whether guardians are carrying out their legal mandates.
- The Court System in NC should have a more active role of not only assigning the guardians, but also, requiring regular and timely reporting as a monitoring tool.

(Recommended by: Division of Aging and Adult Services, Division of Public Health, Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)

6. Establish funding for guardianship services provided by public and nonprofit agencies under the current public guardianship system.

- Appropriate adequate discrete funding is needed to support human service agencies that provide guardianship services.
- There is no specific funding for public agencies providing guardianship services.

- For example, the primary funding source (SSBG funds) currently used to provide many of the services in the county departments of social services (DSSs), including guardianship services, has been stressed for a number of years with adult services getting a decreasing amount of SSBG funds.
- County departments of social services have the majority of public agent guardianship appointments at the local level. For example, DSSs had approximately 72% of the total 2,247 wards in the DHHS Blanket Bond data base on 9/12/2006.
- DSS directors are feeling the pressure of increased responsibility for guardianship appointments and lack adequate funding to support activities associated with the provision of guardianship services.

(Recommended by: NC Association of County Directors of Social Services, Division of Aging and Adult Services)

- Funding available to LMEs is specified for MH/DD/SAS services; guardianship responsibilities are not currently included in the MH/DD/SAS services funding that is appropriated for LMEs.

(Recommended by: Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

7. Expand the statutory provisions on the powers, duties, and liabilities of guardians of the person.

- Place more emphasis on the powers, duties and liabilities of guardians of the person.
- The current statute focuses primarily on estate guardianships.
- The guardianship statute contains very little statutory provisions on the powers and duties and liabilities of guardians of the person.
- There is very little focus on the personal care of wards, or standards for decision making for guardians of the person.
- Revise the guardianship statutes to provide greater protection for the health and welfare of incapacitated adults.

(Recommended by: NC Association of County Directors of Social Services, Division of Aging and Adult Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

8. Develop and implement a comprehensive tracking system to capture the number of people under private guardianships in the state, demographic information, disposition of petitions, and types of guardianships.

- The current tracking system in North Carolina only captures basic data on the number of guardianships in the state.
- This data does not reflect names of guardians, names of wards or types of guardianships.

- An automated tracking system for guardianships may be housed within the Administrative Office of the Courts (AOC). (This was also a recommendation by AOC)
(Recommended by: Division of Aging and Adult Services, NC Association of County Directors of Social Services, Division of Public Health)

9. Expand resources to reimburse multidisciplinary evaluations (MDEs).

- The reimbursement for conducting a MDE is not adequate and will not attract providers to do this. The clinical staff needed to conduct MDEs no longer reside in the LMEs, where these evaluations were previously done and supported. Currently these evaluations must be purchased in the private sector, which requires adequate reimbursement for time and expertise.
- LMEs no longer have clinical staff to conduct MDEs due to divestiture. This lack of staff is a barrier for obtaining court ordered MDEs needed for guardianship proceedings.
- The current reimbursement rates for MDEs are not adequate to compensate private and public providers to conduct these evaluations.
- There is one funding source, and competition for funds to reimburse MDEs and forensic screenings.
(Recommended by: Division of Aging and Adult Services, NC Council of Community Programs)

10. Study the feasibility of adopting standards of practice for guardians in North Carolina.

- North Carolina does not have standards for practice that reflect how guardians should carry out their roles and responsibilities.
- The National Guardianship Association (NGA) has developed Standards for Practice that can be used as a model.
- A study subgroup made up of key stakeholders (AOC, Institute of Government, Clerks of Courts, local and state public and private agencies, etc.) should study the feasibility of whether the NGA Standards of Practice would be appropriate for North Carolina's guardianship system.
(Recommended by: Division of Aging and Adult Services)

11. Educate citizens with respect to guardianship and alternatives to guardianship.

- There are instances in which individuals have not been adjudicated incompetent but are nonetheless incapable of providing consent for services or of knowingly participating in a treatment planning session.

- In the case of disabled adults, parents previously provided consent when their adult children were minors; once these individuals reach the age of majority, many parents don't pursue guardianship and continue to provide "consent" for the individual's services.
- This has implications for limitations on confidentiality as well as for appropriate consent for and receipt of services.
- This also impacts the appeal of agency denials, terminations, suspensions and reductions of services.

(Recommended by: Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

12. Review the State's adult protective services law.

- The APS law should be re-designed to reflect the Clearinghouse Model as presented to the NC Study Commission on Aging on 10/11/2006, and shared with the co-chairs of the House Study Committee on State Guardianship Laws.

(Recommended by: Division of Aging and Adult Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)

**Recommendations of the Clerks of Superior Court
to the
House Study Committee on State Guardianship Laws
November 2, 2006**

Office of Public Guardian. For situations where there is no estate, no family members, or no one who can be bonded there is a need for a professional guardian to serve as guardian of the person or guardian of the estate, as appropriate. County Departments of Social Services, Health and Local Management Entities can currently serve in this capacity, but often request not to serve because of lack of funding for personnel to serve in this capacity. G.S. §35A-1213(d).

Clerks recommend that an Office of Public Guardian be established or DHHS be provided sufficient funding to provide this service under the existing legal framework.

Multidisciplinary Evaluations (MDE). Clerks continue to have difficulty obtaining MDEs for alleged incompetents who are indigent or without insurance. In the past this was handled by local mental health agencies, but with the creation of local management entities (LMEs) the LMEs are either taking months to do the evaluations or refuse to provide this service, again due to limited or no funding. G.S. §35A-1111. The law requires DHHS to pay for the evaluations if the alleged incompetent is indigent. G.S. §35A-1116(b).

Clerks recommend that LMEs be provided sufficient funding to complete MDEs in the time required by law.

Authority to Order Transport. On occasion an alleged incompetent will refuse to meet with a professional who has agreed to conduct a MDE. Without the evaluation the Clerk will not have sufficient evidence to determine whether the person is incompetent. The Clerks do not have statutory authority to order law enforcement to transport the alleged incompetent when he or she refuses to comply.

Clerks recommend that they be given authority to order law enforcement to pick up and transport alleged incompetents to a location(s) where the MDE will be performed.

Limited Guardianships and DMV. The Legislature enacted legislation to permit appointment of limited guardians when the ward is able to make certain decisions on his or her behalf. A limited guardianship is particularly useful in circumstances where the incompetency is episodic, such as occurs in people with mental illness. Many wards, in fact, function very well while on medication.

Clerks are required to notify DMV of a finding of incompetency, whereupon DMV usually revokes the person's license. G.S. §20-17.1(b). Many of these people can still drive and the clerk should have the ability to recommend the license not be revoked.

DMV does provide an appeal process from its decision, but the process takes time and the ward often has to hire counsel to be represented at the hearing.

Clerks recommend that the Clerk have authority to order that a driver's license be maintained.

Sale of Personal Property without Court Order. Currently the guardian can sell up to \$1500 of the ward's personal, over the lifetime of the guardianship, if needed to pay bills. G.S. §35A-1251(17). This figure is too low by today's standards and should be increased.

Clerks recommend the total amount of personal property that can be sold without a court order be increased to a more reasonable figure, perhaps a high as 10,000.

Training of Guardians *ad litem* (GAL). There is currently no formal training for GALs on their legal and ethical responsibilities. The office of Indigent Defense Services (IDS) is responsible for paying the fees of the GAL if the ward is indigent. G.S. §35A-1116(c).

Clerks recommend funding be provided to IDS to provide for formal, regular training of GALs.

Prepared by Pamela Weaver Best, Deputy Legal Counsel, NC Administrative of the Courts

MEMORANDUM

TO: Representative Jean Farmer-Butterfield,
Co-Chair, House Study Committee on State Guardianship Laws
Representative Alice Bordsen,
Co-Chair, House Study Committee on State Guardianship Laws

FROM: John L. Saxon, Professor of Public Law & Government,
School of Government, The University of North Carolina at Chapel Hill

SUBJECT: Guardianship Reform

DATE: November 2, 2006

As requested by the committee, I have identified five subjects that might be addressed through legislation to revise North Carolina's guardianship statutes (short of a comprehensive revision of Chapter 35A of the General Statutes using the Uniform Guardianship and Protective Proceedings Act and recommendations of recent national guardianship conferences as a starting point) and have submitted for the committee's consideration draft legislation with respect to these five subjects. The five drafts are intended to "stand alone" with respect to each subject and are summarized below (though the summaries do not address every provision or change in the drafts).

Before summarizing the draft legislation, though, it is important for me to note, and for the committee to understand, that it is not my role, nor the role of the Institute of Government, to recommend, endorse, or advocate any particular public policy with respect to guardianship reform or any particular legislative proposals related to guardianship reform. By necessity, the proposed legislation that I have drafted for the committee's consideration reflects certain policies—primarily those that underlie the Uniform Guardianship and Protective Proceedings Act and the recommendations of recent national guardianship conferences. The committee, General Assembly, policymakers, and stakeholders, however, will have to determine whether the policies reflected in the draft legislation are consistent with the policies that guide their vision of guardianship reform and whether the draft legislation should be revised or discarded to the extent that it fails to reflect the values, perspectives, and policy decisions of the committee, General Assembly, policymakers, or stakeholders.

As requested, I will attend the committee's meeting on Thursday, November 16, 2006, at 10:00 am, to discuss possible legislative approaches to guardianship reform. Please feel free to call (919-966-4289) or email (saxon@sog.unc.edu) me if I can be of further assistance to you or the committee between now and November 16.

Powers and Duties of Guardians of the Person

The draft legislation is based primarily on the provision of the Uniform Guardianship and Protective Proceedings Act regarding powers and duties of guardians of the person. It makes no change regarding the powers and duties of guardians of the estate.

The draft includes separate provisions for guardians of incompetent persons and guardians for minors. In the case of guardians of incompetent persons, the draft legislation adopts a “substituted judgment” standard and reflects the concept of limited guardianship. The draft also requires a guardian of the person to act consistently with the ward’s health care power of attorney or advance directive unless doing so is not in the ward’s best interest. The draft also includes a provision allowing the clerk to issue an order directing law enforcement officials to assist a guardian of an incompetent person in taking physical custody of the ward.

The draft allows a guardian of the person to exercise limited authority with respect to a ward’s income or property. The draft also expands the provisions allowing the clerk to require guardians of the person to post a bond and to file status reports for wards, and includes provisions allowing the payment of compensation (not merely reimbursement) of guardians of the person.

Public Guardianship

The draft directs the UNC Institute on Aging to study issues regarding public guardianship and to make detailed recommendations regarding the provision and funding of public guardianship services.

The draft also modifies the definition of “disinterested public agent” (specifying state, regional, and local aging agencies, retaining county social services agencies, and deleting local public health and mental health agencies), provides equivalent treatment of “disinterested public agent” guardians and “public guardians,” establishes specific priorities regarding the appointment of individuals, corporations, and public guardians, and prohibits the appointment of disinterested public agents when their agencies’ provision of services to a ward might constitute a conflict of interest. The draft also provides funding for the development of training materials for guardians.

Jurisdiction and Portability

The draft legislation revises the jurisdictional provisions governing incompetency and guardianship proceedings. It does not revise the jurisdictional provisions regarding guardianship proceedings involving minors.

The revised jurisdictional provisions are similar, but not identical, to the jurisdictional provisions of the Uniform Child Custody Jurisdiction and Enforcement Act and attempt to address problems involving interstate jurisdictional disputes and “granny snatching” by incorporating into the jurisdictional requirements the concept of an incapacitated person’s “home state” and the requirement for a “substantial connection” between the respondent and the forum state rather than mere presence, by including provisions requiring courts to communicate when simultaneous incompetency and guardianship proceedings are filed in North Carolina and a sister state, and by limiting the authority to appoint a guardian (other than an ancillary guardian) in North Carolina when a guardian has been appointed under the laws of another state. Because the concept of “domicile” is problematic in the case of an individual who may lack the capacity to determine his or her domicile, the draft speaks in terms of “residence” rather than “domicile.”

Current law speaks of two potentially separate proceedings involving incompetent persons—proceedings to adjudicate incompetence under Article 1 of Subchapter I of Chapter 35A of the General Statutes and proceedings to appoint a guardian for an incompetent person under Article 5 of Subchapter II of Chapter 35A. In order to ensure that one uniform

jurisdictional standard applies in guardianship proceedings involving incompetent persons, the draft legislation merges incompetency and guardianship proceedings into one proceeding.

The draft legislation expressly provides that, unless otherwise provided, the rules of civil procedure and the rules of evidence apply in guardianship proceedings involving incompetent persons.

The draft legislation revises the provisions of current law regarding appeals from the clerk's determination of incompetence or appointment of a guardian for an incompetent person. Under the draft legislation, the clerk's order appointing a guardian for an incompetent person, including the clerk's (or jury's) determination of incompetency, could be appealed to the superior court pursuant to G.S. 1-301.3, but the superior court generally would not conduct a de novo hearing on the issue of incompetency.

In accordance with recommendations by the National Probate Judges Association, the draft legislation adds provisions addressing guardianship "portability." These provisions allow North Carolina to "import" a guardianship from another state if a guardian has been appointed under the laws of another state and the ward has moved to North Carolina. When a guardianship is "imported," the guardian is subject to North Carolina law regarding guardianship. If a guardian has been appointed in another state and the ward is not a resident of North Carolina (but the guardian needs to take some action on behalf of the ward in North Carolina), the draft legislation provides that the foreign guardian's authority may be recognized in North Carolina without requiring the appointment of an ancillary guardian under Article 12. If a ward moves out of North Carolina, the draft includes a provision allowing the "export" of the guardianship to another state.

Incapacity and Limited Guardianship

The draft legislation revises the definition of "incompetency" and replaces the term "incompetency" with "incapacity."

The revised definition of "incapacity" is based on the definition of "incapacity" in the Uniform Guardianship and Protective Proceedings Act and focuses on an individual's cognitive or communicative incapacity and the impact of that incapacity on the individual's functional abilities.

The draft legislation also makes it clear that the clerk may not appoint a guardian for an incapacitated person if guardianship is not the "least restrictive" means of protecting the individual or the individual's property and that the clerk must enter a limited guardianship order if warranted by the nature and extent of the ward's incapacity.

The draft legislation replaces the current provisions regarding "multidisciplinary evaluations" by "designated agencies" with provisions (drawn primarily from the UGPPA) for "professional evaluations" by designated agencies, physicians, psychologists, and other qualified professionals and provides that these evaluations may be considered if they are otherwise admissible as evidence in an incompetency or guardianship proceeding.

Role of Court-Appointed Lawyers

The draft legislation provides that a lawyer who is appointed to represent a respondent in an incompetency or guardianship proceeding acts as the respondent's legal counsel, not as a guardian ad litem under Rule 17, and must comply with the State Bar's Rules of Professional Conduct, including the rule governing representation of a client with diminished capacity. This recommendation is consistent with the recommendation of the Wingspan National Guardianship

Conference. Unlike the UGPPA, however, this draft does not require that a “visitor” be appointed to assist the court in determining whether a respondent is incapacitated, etc.

The draft legislation provides that appointment of lawyers for respondents in incompetency and guardianship proceedings will be pursuant to rules adopted by the Office of Indigent Defense Services and appropriates funds to offset IDS personnel costs regarding the appointment, supervision, and training of court-appointed lawyers. The draft legislation also appropriates funds to develop training materials for lawyers who represent respondents in incompetency and guardianship proceedings.

The draft legislation also provides that, notwithstanding Rule 17 of the Rules of Civil Procedure, a guardian ad litem will not be appointed for a respondent in an incompetency and guardianship proceeding unless the respondent’s counsel, acting pursuant to the Rules of Professional Responsibility, asks that a guardian ad litem be appointed and the clerk determines that appointment of a guardian ad litem is appropriate under Rule 17 (which would require a determination that the respondent is incompetent at least with respect to management of the pending legal proceeding). The draft legislation provides that a designated state or local human services agency may serve as a respondent’s guardian ad litem if appointment of a guardian ad litem is requested and appropriated and the agency is not a party to the proceeding.

MEMORANDUM

TO: Representative Jean Farmer-Butterfield,
Co-Chair, House Study Committee on State Guardianship Laws
Representative Alice Bordsen,
Co-Chair, House Study Committee on State Guardianship Laws

FROM: John L. Saxon, Professor of Public Law & Government,
School of Government, The University of North Carolina at Chapel Hill

SUBJECT: Guardianship Reform: Proposed G.S. Chapter 35B

DATE: November 7, 2006

As requested by the committee, I previously identified five subjects that might be addressed through legislation to revise North Carolina's guardianship statutes and submitted for the committee's consideration draft legislation with respect to these five subjects. Enactment of that legislation, however, would fall far short of comprehensive reform of North Carolina's guardianship statutes.

Therefore, I am enclosing, for the committee's possible consideration, a very rough draft of a comprehensive reform of North Carolina's guardianship statutes—a proposed Chapter 35 B of the General Statutes that is based on, but not identical to, the Uniform Guardianship and Protective Proceedings Act and that would replace North Carolina's current guardianship law in Chapter 35A of the General Statutes. A summary of the proposed legislation and the UGPPA, along with finding charts for comparing the provisions of the proposed legislation with the provisions of current law is attached.

Although the proposed legislation is comprehensive and, in many respects, differs substantially from North Carolina's current guardianship statutes, it constitutes a true reform and modernization of North Carolina's guardianship law and provides an arguably better alternative to the enactment of "piece-meal" legislation amending specific provisions of G.S. Chapter 35A.

Again, though, it is important for me to note, and for the committee to understand, that it is not my role, nor the role of the Institute of Government, to recommend, endorse, or advocate any particular public policy with respect to guardianship reform or any particular legislative proposals related to guardianship reform. By necessity, the proposed legislation reflects certain policies—primarily those that underlie the Uniform Guardianship and Protective Proceedings Act and the recommendations of recent national guardianship conferences. The committee, General Assembly, policymakers, and stakeholders, however, will have to determine whether the policies reflected in the draft legislation are consistent with the policies that guide their vision of guardianship reform and whether the draft legislation should be revised or discarded to the extent that it fails to reflect the values, perspectives, and policy decisions of the committee, General Assembly, policymakers, or stakeholders.

As requested, I will attend the committee's meeting on Thursday, November 16, 2006, at 10:00 am, to discuss possible legislative approaches to guardianship reform. Please feel free to call (919-966-4289) or email (saxon@sog.unc.edu) me if I can be of further assistance to you or the committee between now and November 16.

**North Carolina Study Committee on State Guardianship Laws
Recommendations with Fiscal Implications from DHHS and Local Human
Services Agencies**

November 16, 2006

We are presenting five recommendations which are the priorities from the list of the twelve recommendations presented by the Division of Aging and Adult Services to the Study Committee on November 2, 2006. The first three are based on the parameters previously set by the Study Committee to pare down its issues for study to those items that will require limited revisions to the current statute, have limited fiscal impact, enjoy broad based support and improve the current system.

Recommendations four and five in Section II have been identified by the Department of Health and Human Services (DHHS) Divisions and all local agencies that serve as guardians as important issues to improve North Carolina's current public guardianship system.

Section I. Recommendations for limited revisions to North Carolina's current guardianship program

Recommendation 1: Change the definition of "incompetent adult" to reflect the individual's functional capacity, such as, the definition in the Uniform Guardianship Protective Proceedings Act (UGPPA) of an "incapacitated person".

- The determination of whether an individual is an incompetent adult should be based on that individual's functional ability, recognizing that he/she may have the capacity to do some activities while needing help with others.
- The current definition in G. S. 35A of "incompetent adult" is based upon a diagnosis, for example, mental illness, mental retardation, cerebral palsy, senility, inebriety, and does not acknowledge the functional abilities of individuals with these diagnoses.
- A focus on the individual's functioning will allow guardianships to be tailored to the particular individual and facilitate the use of limited guardianships.

(Recommended by: Division of Aging and Adult Services, NC Association of County Directors of Social Services, Division of Public Health)

(This recommendation is also supported by: Institute of Government, Administrative Office of the Courts, and NC Association of Clerks of Superior Court)

Fiscal Impact: Modest costs to be determined by the Administrative Office of the Courts

Recommendation 2: Expand the statutory provisions on the powers, duties, and liabilities of guardians of the person.

- Place more emphasis on the powers, duties and liabilities of guardians of the person.
- The current statute focuses primarily on estate guardianships.
- The guardianship statute contains very little statutory provisions on the powers and duties and liabilities of guardians of the person.

(Recommended by: NC Association of County Directors of Social Services, Division of Aging and Adult Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

(This recommendation is also supported by: Institute of Government)

Fiscal Impact: Modest costs to be determined by Administrative Office of the Courts

Recommendation 3: Study the feasibility of adopting standards of practice for guardians in North Carolina.

- North Carolina current guardianship law does not have standards of practice that reflect how guardians should carry out their roles and responsibilities.
- The National Guardianship Association (NGA) has developed Standards for Practice that can be used as a model.
- The DHHS public agency guardianship system and some corporations have incorporated a number of the Standards of Practice developed by the NGA.

(Recommended by: Division of Aging and Adult Services)

(This recommendation is also supported by: Institute of Government)

Fiscal Impact: \$30,000 for study conducted by the Division of Aging and Adult Services and key stakeholders

Section II. Recommendations for North Carolina's Public Guardianship System

Recommendation 4. Study the role of public human services agencies in providing guardianship services to be conducted by an independent entity.

- The role of public human service agencies in providing guardianship services should be studied.

(Recommended by: Division of Aging and Adult Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

- The study should be conducted by an independent contactor with a long standing, proven track record in convening tasks forces, conducting research, and writing comprehensive reports.
- The current House Study Committee on State Guardianship Laws should be continued and expanded to include Senate members for SFY 07-08 and 08-09 of the legislative biennium.
 - The first items for consideration by the Study Committee should be a comprehensive study of the existing public agency guardianship program, including recommendations for improving the system and providing full funding.

(Recommended by: NC Association of County Directors of Social Services)

- There should be an impartial, third party, neutral public entity to serve as the guardian of last resort. As the mental health world has changed and Local Management Entities (LMEs) no longer have the kind of staff to supervise the issues presented by wards, and because of the conflict issues of being a primary purchaser of services with providers, it is felt that a neutral third party would serve the interests of wards best.

(Recommended by: NC Council of Community Programs)

- An Office of Public Guardianship should be established to case manage the wards (indigent) and could do so on a regional basis.

(Recommended by: Division of Public Health)

- Public agencies (DSS, Aging, Health, and Mental Health LMEs) should not function in the guardianship role. (Recommended by: NC Association of Local Health Directors, Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)
- Consider contracting out guardianship to a corporation or a public entity that employs both a lawyer and a licensed care manager who work solely with guardianship.

(Recommended by: Orange County Department on Aging, the sole county department on aging currently serving as public agent guardian)

(This recommendation is also supported by: Administrative Office of the Courts, NC Association of Clerks of Superior Court, and Institute of Government))

Fiscal Impact: \$200,000

Recommendation 5: Establish funding for guardianship services provided by public agencies under the current public guardianship system.

- Appropriate adequate discrete funding to support human service agencies that provide guardianship services and essential medical and legal services for indigent wards.

- There is no specific funding for public agencies providing guardianship services.
- DSS directors are feeling the pressure of increased responsibility for guardianship appointments and lack adequate funding to support activities associated with the provision of guardianship services.

(Recommended by: NC Association of County Directors of Social Services, Division of Aging and Adult Services)

- Funding available to LMEs is specified for MH/DD/SAS services; guardianship responsibilities are not currently included in the MH/DD/SAS services funding that is appropriated for LMEs.

(Recommended by: Division of Mental Health, Developmental Disabilities and Substance Abuse Services)

(This recommendation is also supported by: Administrative Office of the Courts, NC Association of Clerks of Superior Court, and Institute of Government))

Fiscal Impact: Total State Funding: \$5,121,783

County Departments of Social Services: \$3,696,000 (\$2,772,000/\$924,000)

Rationale:

- 5% per year anticipated growth in DSS caseload over 07/09 biennium
- 1:20 staff to ward ratio (caseload size)
- SW III classification
- \$66,000 (includes salary, fringe and overhead)
- 75/25 match

Local Management Entities (LMEs): \$2,706,000 (\$2,029,500/\$675,500)

Rationale:

- 5% per year anticipated growth in mental health caseload over 07/09 biennium
- 1:20 staff to ward ratio (caseload size)
- \$66,000 (includes salary, fringe and overhead)
- 75/25 match

Local Health Departments: to support existing capacity: \$20,381/yr.
(\$15,286/\$5,095)

Rationale:

- 30 cases

County Departments on Aging: to support existing capacity: \$6,662/yr.
(\$4,997/\$1,665)

Rationale:

- 3 cases

Essential legal and medical consultation: \$300,000.

- 1 (9) A representative of the Governor's Advocacy Council for Persons
2 With Disabilities.
- 3 (10) A director of a local management entity appointed by the President Pro
4 Tempore of the Senate.
- 5 (11) A representative of the Mental Health Association in North Carolina
6 appointed by the Speaker of the House of Representatives.
- 7 (12) A member of an aging advocacy support group appointed by the
8 President Pro Tempore of the Senate.
- 9 (13) A county director of public health appointed by the Speaker of the
10 House of Representatives.

11 In addition, representatives designated by the following organizations shall
12 serve as ex-officio, nonvoting members of the Commission:

- 13 (a) The North Carolina Bar Association.
- 14 (b) The Arc of North Carolina.
- 15 (c) North Carolina Guardianship Association.
- 16 (d) Alzheimer's Association – Western Chapter.
- 17 (e) Alzheimer's Association – Eastern Chapter.
- 18 (f) Carolina Legal Assistance.
- 19 (g) The Area Agencies on Aging.
- 20 (h) County Departments of Aging.
- 21 (i) A County Director of mental health, developmental disabilities, and
22 substance abuse services

23 The Speaker shall designate one Representative as cochair, and the President
24 Pro Tempore shall designate one Senator as cochair. Vacancies on the Commission
25 shall be filled by the same appointing authority as made the initial appointment. The
26 Commission shall expire upon delivering its final report.

27 The Commission, while in the discharge of its official duties, may exercise all
28 powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The
29 Commission may meet at any time upon the joint call of the cochairs. The Commission
30 may meet in the Legislative Building or the Legislative Office Building. The
31 Commission may contract for professional, clerical, or consultant services as provided
32 by G.S. 120-32.02.

33 The Legislative Services Commission, through the Legislative Services
34 Officer, shall assign professional staff to assist the Commission in its work. The House
35 of Representatives' and the Senate's Supervisors of Clerks shall assign clerical staff to
36 the Commission, and the expenses relating to the clerical employees shall be borne by
37 the Commission. Members of the Commission shall receive subsistence and travel
38 expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

39 **SECTION 1.(c)** In conducting the study, the Commission shall consider
40 issues related to guardianship for incompetent persons and minors including, but not
41 limited to, the following:

- 42 (1) Whether guardianship should be a remedy of last resort used only if
43 less restrictive alternatives are insufficient.
- 44 (2) The definition of incompetency or, if appropriate, incapacitated.

- 1 (3) Whether courts should be required to make express findings regarding
- 2 the extent of a person's incapacity and limit the scope of the
- 3 guardianship accordingly.
- 4 (4) Legal rights retained or lost as a result of being adjudicated
- 5 incompetent.
- 6 (5) The role of public human services agencies in providing guardianship
- 7 services.
- 8 (6) Legal procedures and protections in guardianship proceedings.
- 9 (7) Public monitoring of guardianship.
- 10 (8) Examination of current training resources and the possible
- 11 collaboration and coordination of current training resources for all
- 12 stakeholders including family members, individuals, corporate
- 13 guardians and public agencies.
- 14 (9) Certification of all guardians and adoption of standards of practice for
- 15 guardians.
- 16 (10) Educating citizens with respect to guardianship and alternatives to
- 17 guardianship.
- 18 (11) Powers, duties, and liabilities of guardians, including guardians of the
- 19 person.
- 20 (12) Creation of Office of Public Guardian.
- 21 (13) Public guardianship, including the provision and funding of public
- 22 guardianship services, treatment of disinterested public agent
- 23 guardians, priorities regarding appointment of individuals,
- 24 corporations, and public guardians, and possible conflicts of interest
- 25 with the appointment of certain disinterested public agent guardians.
- 26 (14) Funding for guardianship services provided by nonprofit agencies
- 27 including the need of current corporate guardians for additional
- 28 resources in providing services to wards.
- 29 (15) Implementation of additional corporate guardianship programs.
- 30 (16) Enactment of the Uniform Guardianship and Protective Proceedings
- 31 Act (UGPPA) or similar revision of current Chapter 35A.
- 32 (17) Jurisdictional provisions governing incompetency and guardianship
- 33 proceedings and portability of guardianship for foreign guardians.
- 34 (18) Role of court-appointed lawyers and guardians ad litem in
- 35 guardianship proceedings to ensure adequate representation of
- 36 respondents.
- 37 (19) Whether guardianship statutes need revision to provide greater
- 38 protection of the health and welfare of incapacitated adults.
- 39 (20) Whether the State should track the number of people under private
- 40 guardianship and, if so, proposed methods for the tracking.
- 41 (21) Prudent investor rules.
- 42 (22) Review of the State's adult protective services law.

43 **SECTION 2.** The Legislative Study Commission on State Guardianship
44 Laws may make an interim report to the 2007 General Assembly not later than the

1 convening of the 2008 General Assembly, and shall make its final report to the 2009
2 General Assembly, Regular Session 2009 upon its convening.

3 **SECTION 3.** All State departments and agencies and local governments and
4 their subdivisions shall furnish the Commission with any information in their possession
5 or available to them.

6 **SECTION 4.** There is appropriated from the General Fund to the General
7 Assembly the sum of thirty thousand dollars (\$30,000) for the 2007-2008 fiscal year and
8 the sum of thirty thousand dollars (\$30,000) for the 2008-2009 fiscal year to carry out
9 the purposes of this act.

10 **SECTION 5.** This act becomes effective July 1, 2007.